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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 415

FOREMAN'S ASSOCIATION OF AMERICA,
Petitioner,

vs.

EDWARD G. BUDD MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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vs.

EDWARD G. BUDD MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Foreman's Association of America, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered pursuant to remand from this Court, modifying a prior judgment of the Circuit Court of Appeals for the Sixth Circuit entered on June 3, 1947 and setting aside

Paragraphs 1(a), 1(b) and 2(c) of the order of the National Labor Relations Board of January 30, 1946 but leaving in force and effect the other provisions of the order as to which it had theretofore decreed enforcement.

Opinions Below

The decree of the court below entered June 3, 1947 without opinion appears at R. 321 and is reported at 162 F 2d 461. Its opinion dated August 16, 1948 appears at R. 322 and is reported at 169 F 2d 571. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 53-58, 31-47) are reported in 65 N. L. R. B. 612.

Jurisdiction

The decree of the court below (R. 321), enforcing in full the order of the Board, was entered on June 3, 1947. The order of this Court granting certiorari to a limited extent and remanding the cause to the court below for consideration of the effect of the Labor Management Relations Act of 1947 on the question to which the grant of certiorari was limited, was entered on December 15, 1947. The decree of the court below, pursuant to the remand of this Court, was entered on August 16, 1948, modifying and setting aside its prior decree of June 3, 1947. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U. S. C., Section 1254, and Section 262 of the Judicial Code, 28 U. S. C., Section 1651, and under Section 10(f) of the National Labor Relations Act, 29 U. S. C. 160(f).

Statutes Involved

The pertinent provisions of the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C. (1940 ed.) 151 *et seq.*; of the Labor Management Relations Act of 1947, Public Law 101, 80th Cong., 1st Sess. Chap. 120, (29 U. S. C.

(1947 ed.) 151 *et seq.*); of Section 2 of the Norris La Guardia Act (29 U. S. C. 102); and of Section 24(8) of the Judicial Code as amended (28 U. S. C. (1948 ed.), Section 1337) are set forth in the Appendix *infra* pp. 26-30.

Questions Presented

1. Were Petitioner, and the supervisor employees whom it represents, denied due process of law under the Fifth Amendment to the Constitution by reason of the holding of the court below that Sections 2(3), 2(11) and 14(a) of the Labor Management Relations Act of 1947 validly prohibits the enforcement of an order of cessation of unfair labor practices entered by the National Labor Relations Board and originally enforced by the court below under the National Labor Relations Act of 1935, where Sections 2(3), 2(11) and 14(a) of the Labor Management Relations Act of 1947 deprive supervisory employees of all existing remedies, national and local, before the Board, the courts, or otherwise, for employer violations of their constitutional rights to self-organization and to bargain collectively through representatives of their own choosing free from restraint or coercion, without providing any opportunity for the protection of that right, which neither Congress nor the courts have power to abridge or to destroy.

2. Were Petitioner, and the supervisory employees whom it represents, denied due process of law under the Fifth Amendment to the Constitution by reason of the holding of the court below that Sections 2(3), 2(11) and 14(a) of the Labor Management Relations Act of 1947 properly classify supervisory employees as representatives of management and validly deprive supervisory employees of the protection given by the act to other employees, where (a) such other employees include plant guards and professional employees who are similarly representative of management;

(b) management itself is granted the protection of the act in its selection of representatives for the purposes of collective bargaining; (c) other federal labor legislation provides protection for supervisory employees similarly situated, and (d) supervisory employees under the Labor Management Relations Act of 1947 are denied all remedies before the Board, the courts or otherwise under any law, national or local, relating to collective bargaining for the protection of the same rights which supervisory employees under other federal legislation and non-supervisory employees under this legislation are furnished protection.

Petitioner assigns as error by the court below negative answers to each of the foregoing questions.

Statement of Matters Involved

On January 3, 1947, the National Labor Relations Board (hereinafter referred to as the Board) issued its Decision and Order (R. 53, 31), finding, in pertinent part, that Foreman's Association of America Ch. 77 (hereinafter referred to as the Association) was a labor organization within the meaning of Section 2(5) of the National Labor Relations Act of 1935 (49 Stat. 449), and that the Edward G. Budd Manufacturing Company, (hereinafter referred to as the Company) had engaged in unfair labor practices within the meaning of Section 8(1) and 8(3) of the said Act by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the said Act and by discriminating in regard to the hire and tenure of employment of a named foreman, thereby discouraging membership in the Association. The Board ordered the Company to:

> "Cease and desist from:
>
> "(a) Discouraging membership in the Foreman's Association of America by discharging, laying off or re-

fusing to transfer to production jobs any of its supervisory employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

"(b) In any other manner, interfering with, restraining or coercing its supervisory employees in the exercise of the right to self-organization, to form, join, assist or bargain collectively through Foreman's Association of America and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act". (R. 55).

The Board also ordered the Company to offer reinstatement and back pay to the named foreman found to have been discriminated against and to post and maintain for sixty days at its plant notices embodying the terms of the Board's Order. (R. 55-58).

On June 3, 1947, relying on the authority of *Packard Motor Car Company* v. *National Labor Relations Board* 330 U. S. 485, the court below ruled that the supervisory employees and foremen of the Company were employees within the meaning of the National Labor Relations Act of 1935 and decreed enforcement in full of the order of the Board, (R. 321) *National Labor Relations Board* v. *Edward G. Budd Manufacturing Company* 162 F 2d 461 (C. C. A., 6th).

Thereafter on June 23, 1947, Congress enacted the Labor Management Relations Act of 1947, Public Law 101, 80th Congress 29 U. S. C. A. Section 151 *et seq.* effective August 22, 1947, amending the provisions of the National Labor Relations Act. In view of the changes in the law with respect to supervisory employees made by this Amendment, the Company petitioned this Court for a writ of certiorari. The Association petitioned for leave to intervene on the ground that the Amendment was unconstitutional, particularly in its provisions relating to supervisors. By order of December 15, 1947, this Court granted the petition to

intervene, granted certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs petitioner to cease and desist from discouraging membership in the Foreman's Association of America" and remanded the cause to the court below "for consideration of the effect of the Labor Management Relations Act of 1947 . . . on the question to which the grant of certiorari was limited." *Edward G. Budd Manufacturing Co.* v. *National Labor Relations Board,* 332 U. S. 840.

On the remand to the court below, petitioner contended *inter alia* that Sections 2(3), 2(11) and 14(a) of the amended act relating to supervisors are unconstitutional because they deprive supervisors employed by employers subject to the amended act not merely of the protection of the amended act but of all remedies under any law, national or local, relating to collective bargaining for the redress of employer violations of rights secured by the First Amendment to the Constitution and guaranteed by Section 7 of the original, as well as of the amended act. The court below rejected this contention. It held that these rights, though long recognized, were protected by the Constitution against governmental infringement only; that the National Labor Relations Act created rights against employers which did not exist before, not as private rights vested in employees but as public rights protected by the power placed by the act in the Board; that nothing in the amended act interferes with the rights of supervisory employees guaranteed by the First Amendment; and that the amended act was merely a grant of statutory protection for the enforcement of those rights which Congress was privileged to change at a later time by withdrawal of that protection (R. 329). For reasons stated below, petitioner assigns this holding as error.

Petitioner also contended that Sections 2(3), 2(11) and 14(a) of the amended act are based upon an arbitrary classification with resulting discrimination against supervisory employees and so violate the Fifth Amendment of the Constitution. The Court below held the action of Congress in deciding as a matter of policy that in the enforcement of the National Labor Relations Act supervisory employees must be treated as either a part of management or as a part of the employees and in treating them as a part of management was based upon substantial and real considerations and was not an arbitrary or unjustifiable classification. (R. 330-331). For reasons stated below, petitioner assigns this holding as error.

Petitioner further contended in the court below that the cease and desist provisions of the Board's order and the correlative provisions requiring posting of notices should be enforced because the only barrier to their enforcement were the unconstitutional provisions of Sections 2(3), 2(11) and 14(a) of the amended act, in the absence of which the original Order of the Board as originally enforced by the court below is warranted by the provisions of the original and amended acts. The court below rejected this contention. It held that "Congress intended by the amendment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union and to interfere with their union activities and that the cease and desist provisions of the Board's Order would enjoin the respondent from engaging in conduct in the future which is now lawful". (R. 233). For reasons stated below, petitioner assigns this holding as error.

Reasons for Granting the Writ

I. SECTIONS 2(3), 2(11) AND 14(a) OF THE AMENDED ACT DENY PETITIONER, AND THE SUPERVISORY EMPLOYEES WHOM IT REPRESENTS, DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION BECAUSE THEY

DEPRIVE SUCH EMPLOYEES OF ALL EXISTING REMEDIES IN ALL FEDERAL AGENCIES, INCLUDING THE DISTRICT COURTS, AND IN ALL STATE AND LOCAL AGENCIES, INCLUDING THE STATE LABOR RELATIONS BOARDS, FOR THE REDRESS OF EMPLOYER VIOLATIONS OF CONSTITUTIONAL RIGHTS WHICH NEITHER CONGRESS NOR THE COURTS HAVE POWER TO ABRIDGE OR DESTROY, AND NO REAL OPPORTUNITY EXISTS ELSEWHERE FOR THE PROTECTION OF THOSE RIGHTS.

This Court has recognized the general importance of the problem of supervisory employees, in connection with the administration of the National Labor Relations Act of 1935, with respect to the construction of Section 2(3) of that Act, defining "employee" (*Packard Motor Car Company* v. *National Labor Relations Board, supra*) and the paramount and exclusive jurisdiction of the Board, as against State Labor Relations Boards, over bargaining units of supervisory employees, (*Bethlehem Steel Company* v. *New York State Labor Relations Board* 330 U. S. 767 (1947)). This case raises the issue as to the constitutional validity of Sections 2(3), 2(11) and 14(a) of the amended act in depriving supervisory employees of existing remedies for employer violations of the fundamental rights guaranteed in Section 7 of that Act and other federal legislation, not only under the amended act, but under any law, national or local relating to collective bargaining. As we point out below, the deprivation in these and other sections of the amended act is complete. Jurisdiction to remedy violations of such rights by employers is withdrawn from the State Labor Relations Boards, even where the National Labor Relations Board is itself deprived of jurisdiction (cf. *Bethlehem Steel Company* v. *New York State Labor Relations Board, supra*) and from all courts, including the District Courts of the United States (cf. Section 24 (8), amended, of the Judicial Code, 28 U. S. C., Sec. 1337; *Texas & N. O. R. Co.* v. *Brotherhood of R. and S. S. Clerks* 281 U. S. 548) and other agencies

which would otherwise have such jurisdiction. Under these circumstances, the holding of the court below that the deprivation of all such remedies is constitutionally valid raises a federal question of general importance relating to the construction and application of the Constitution and federal statutes, which, we submit, does not give proper effect to applicable decisions of this Court and which has not been but should be, in the public interest, settled by this Court (see *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill* 281 U. S. 673 (1930); *Truax* v. *Corrigan* 257 U. S. 312 (1921)).

1. The right of employees to self-organization and to select representatives of their own choosing, for collective bargaining or other mutual aid or protection, without restraint or coercion, is a fundamental right, secured under the First and Fourteenth Amendments (*National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 33-34; *American Steel Foundries* v. *Tri City Central Trades Council,* 257 U. S. 184, 209, 27 A. L. R. 360; *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515; *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293; *Carlson* v. *California,* 310 U. S. 88; *Truax* v. *Raich,* 239 U. S. 33, 41). This right is declared and guaranteed as to employees by the amended act (Sections 1 and 7) and by other federal statutes (see Section 2 of the Norris La Guardia Act, 29 U. S. C. A. Section 102) Appendix pp. 26, 28, 29. The court below held that as to supervisory employees, nothing in the amended act had restricted these rights, but that the amended act had merely "changed the statutory method of enforcing those rights" (R. 329). The "change" in the method of statutory enforcement was to take away from supervisory employees the enforcement provisions of the original Act (R. 329) as well as remedies

against employers under any other similar law. (Section 14(a) of the amended act. App. p. 29.)

2. It has long been established that where there is a right, there is a remedy. *Marbury* v. *Madison,* 1 Cranch 137. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . it is a general and indisputable rule, that where there is a legal right, there is a legal remedy by suit or action at law, whenever that right is invaded" (*ibid* 163). In *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks, supra,* the Brotherhood brought suit in the District Court to restrain the Company from interfering with, restraining or coercing the Company's clerical employees in the matter of their organization and designation of representatives for the purposes set forth in the Railway Labor Act of 1926. That Act declared the rights of employees in language similar to that employed in Sections 1 and 7 of the amended Act, (Chap. 347, 44 Stat. at L. 577 U. S. C. Title 45, Section 152) and Section 2 of the Norris La Guardia Act (supra). The Railway Labor Act of 1926, however, provided no statutory method for the protection of these rights. In this respect, the amended Act, with respect to supervisory employees, is similar to the Railway Labor Act of 1926. Both declare and define fundamental rights of employees; neither provides any statutory method for the protection of such rights. In the *Texas* case, the District Court granted the injunction and on contempt proceedings in the exercise of equity powers required the Company to disestablish a company-dominated union, to reinstate the Brotherhood as the recognized representative of its clerical employees, and to reinstate without loss employees who had been discharged by the Company because of their activities on behalf of the Broth-

erhood (24 F. 2d 463; 25 F. 2d 873, 876). The Circuit Court of Appeals affirmed the decree (33 F. 2d 13). In affirming, this Court held "The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalties, in the sense of specially prescribed punishment, with respect to arbitral awards and the prohibition in change of conditions pending the investigation and report of an emergency board, but in each instance, a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. *The right is created and the remedy exists.*" (281 U. S. 569-570 italics supplied) . . . "As the carriers have no constitutional right to interfere with the freedom of employees in making their selections, they cannot complain of the statute on constitutional grounds." (*ibid* 571) See *Virginian Ry. Co.* v. *System Federation No. 40, supra.*

Petitioner cited the *Texas* case in the court below in support of its contention that the same remedy in the District Courts would exist for the protection of the fundamental rights of supervisory employees as was afforded for the clerical employees under the similar provisions of the Railway Labor Act, but for the unconstitutional deprivation of such remedies by the amended act.

The court below, however, appears to have misunderstood our contentions in these respects. We do *not* urge that the protection afforded by the National Labor Relations Act is a constitutional right or that Congress may not withdraw the administrative and other remedies provided by that Act,

or that the Act creates vested rights in those remedies with respect to transactions in the future, or that the Act has created private vested rights of enforcement against employers, rather than public rights of enforcement, generally within the exclusive jurisdiction of the Board (R. 329). Our contentions are

(1) the right of all employees, including supervisory employees, to self-organization and to select representatives of their own choosing, without restraint or coercion, is a right secured by the First Amendment and guaranteed in the original and amended acts and other federal legislation;

(2) absent the administrative machinery provided in the original act for its protection, the same remedies exist for the protection of that right as were invoked in the *Texas* and *Virginian Railway* cases, *supra,* in the District Courts, under Section 24, amended of the Judicial Code, (28 U. S. C. Section 1337)[1] as well as the additional remedies provided by State Labor Relations Acts and other laws relating to collective bargaining, enacted since the National Labor Relations Act (See *Bethlehem Steel Company* v. *New York State Labor Relations Board, supra*); and

(3) although, *arguendo,* the amended act could validly withdraw the administrative and other remedies of the original act for the protection of that right, (See Point II *infra*) it may not, consistently with the due process requirements of the Fifth Amendment, deprive supervisory employees of all remedies, before the District Courts, the State Labor Relations Boards, or other federal or state

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[1] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." (See 28 U. S. C. 1940 ed. Sec. 41(8)(23) March 3, 1911, ch. 231, Section 24, Pars. 8, 23, 36 Stat. 1092, 1093; October 22, 1913, ch. 32, 38 Stat. 219; 28 U. S. .C Section 1337, Reviser's Notese p. '838.)

agencies under any law, national or local, relating to collective bargaining, without providing some real opportunity to protect the right.

3. Sections 2(3), 2(11) and 14(a) of the amended act purport to accomplish such a complete deprivation. The court below construed these sections as if, without restricting the fundamental rights of supervisory employees, they merely withdrew the protection of the original act for the enforcement of those rights against private employers (R. 329). Such a construction is not warranted by the plain terms and legislative history of the statute. Section 14(a) provides that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, *but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors*[2] *as employees for the purpose of any law, national or local, relating to collective bargaining.*" The Board has construed these provisions as removing supervisors from the jurisdiction of the Board (*In the Matter of Westinghouse Electric Corp.*, 75 N. L. R. B. 1, September 30, 1947; Public Announcement W-1, Sept. 10, 1947).[3] Judicial review of such action is not provided by the Administrative Procedure Act. 5 U. S. C. Sections 1001, 1009. Supervisory employees are thus deprived of all opportunity to protect the right administratively before the Board.

Section 14(a), however, does not limit the denial of jurisdiction to the Board. The intention of Congress was to state a "national policy in respect of organization and collective bargaining by foremen." (H. Rep't. 245 on HR 3020 80th Cong., 1st Sess., p. 40). "Section 14. This

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[2] See Section 2(3) and 2(11) of the amended act, App. p. 28.

[3] "The Board dismisses the petitions in the following 59 cases where the petitioners seek certification for a unit of supervisors, since the amendment to the National Labor Relations Act removes supervisors from the definition of employees and, accordingly, from the jurisdiction of the Board. . . ."

is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for *other Federal or State agencies* to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity." (Sen. Rep't. No. 105 on S. 1126, p. 28, 80th Cong., 1st Sess. italics supplied. See also H. Conf. Rep't. No. 510 on HR 3020, 80th Cong., 1st Sess., p. 60). "Supervisors are management people. . . . *It seems wrong and it is wrong* to subject people of this kind . . . to the levelling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism (*J. I. Case Co.* v. *National Labor Relations Board* 321 U. S. 332 (1944)). *It is wrong for the foremen,* for it discourages the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, *it is wrong for industry and particularly for the future strength and productivity of our country* . . . What the bill does is to say . . . that no one, whether employer or employee, need have as his agent one who is obligated to those on the other side or whom for *any* reason he does not trust." (H. Rep't. No. 245 on HR 3020 *ibid* pp. 15-17, italics supplied).

It is apparent, therefore, from the terms and legislative history of Section 14(a) that Congress intended, as a matter of national policy, to withdraw completely all remedies that could be anywhere invoked to protect the rights of supervisory employees to self-organization and collective bargaining, against invasion by private employers.

This conclusion is further supported by the provisions of other sections of the amended act. It is clear that, under the original act, the power of the Board to enforce the rights of employees was paramount and exclusive. *Amalgamated*

Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261; *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra.* Cf. Jaffe, "The Public Right Dogma in Labor Board Cases," 59 Harv. L. Rev. 720 (1946). Despite the elimination of the word "exclusive" in Section 10(a) of the amended act, it has been held, as to individuals who are employees within the meaning of the amended act, that the only rights made enforceable by the amended act were those determined by the Board to exist; that the federal district courts were without jurisdiction to redress, by injunction or otherwise, the unfair labor practices which it defined; and that the exclusive jurisdiction of the Board remained unchanged. *Amazon Cotton Mills* v. *Textile Workers Union*, 167 F. 2d 183 (C. C. A. 4th, 1948). Similarly, since the jurisdiction of the National Labor Relations Board under the amended act is still paramount and the intent is clearly expressed in the amended act to deprive supervisors of all remedies under any law, national or local, relating to collective bargaining, it would appear that the amended act also prohibits State Labor Relations Boards or other state agencies, in the exercise of state police power, from affording remedies to supervisors for the invasion of their rights to self-organization and collective bargaining. *Hill* v. *Florida*, 325 U. S. 538; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605; *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra.*

It is clear, therefore, from the provisions of Section 10(a) of the amended act and from the grant by Congress of paramount authority to the national Board in the field, that Congress intended no regulation of the rights of supervisors except its own. It is equally clear from the provisions of Sections 2(3), 2(11) and 14(a) of the amended act, that Congress intended, by its regulation, that supervisors are to be deprived of all existing remedies that may

be invoked in any federal agency, including the District Courts, and in any state agency, including the State Labor Relations Boards, to redress employer invasions of their rights.

4. Under these circumstances, we submit, Sections 2(3), 2(11) and 14(a) deny petitioner, and the supervisory employees whom it represents, due process of law in violation of the Fifth Amendment to the Constitution. The right of such employees to self-organization and to select representatives for the purpose of collective bargaining without restraint or coercion are rights which, under the First Amendment, Congress may not abridge or destroy. Existing remedies for the enforcement of these rights were gathered up by Congress under the original act and placed within the paramount jurisdiction of the National Labor Relations Board, which furnished a single, exclusive remedy for their protection. The amended act, without restricting such rights, nevertheless deprived supervisory employees of all opportunity to protect those rights administratively before the Board, (See Note, Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of the Courts, 51 Harv. L. Rev. 125 (1938)) and of all preexisting remedies under any law, national or local, through any agency, federal or state, which would have been available, in the absence of the single, paramount and exclusive national agency of protection. Such a complete deprivation constitutes a denial of due process. "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it". *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 682; *Truax* v. *Corrigan* 257 U. S. 312, 330, 332; *Graham* v. *Good-*

cell 282 U. S. 409, 426-443 (citing cases); *Duke Power Co.* v. *So. Carolina Tax Commission* 81 F 2d 513, 517 (C. C. A. 4th, 1936); *Farley* v. *Abbetmeier* 114 F 2d 569, 577 (App. D. C. 1940). Here, under the amended act, supervisory employees are denied due process in its primary sense of an opportunity to be heard by any tribunal in defense of their substantive rights, see *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill, supra,* at p. 678; *Postal Tel. Cable Co.* v. *Newport,* 247 U. S. 464, 476, and also in the sense of access to existing remedies in the district courts and state agencies for judicial or other enforcement of their rights. The court below held that Congress intended by the enactment of the amended act that employers be free in the future to discharge supervisors for joining a union and to interfere with their union activities (R. 333). We submit that such was the intent of Congress. The court below held that such conduct was now lawful (R. 333). We submit that such conduct is lawful only because Congress, in Sections 2(3), 2(11) and 14(a) of the amended act, has unconstitutionally deprived supervisory employees of all remedies for the employer-invasion of their constitutionally protected rights, as guaranteed in Section 7 of the amended act and Section 2 of the Norris LaGuardia Act. Otherwise, such conduct is clearly unlawful. The holding of the court below has not given proper effect to the applicable decisions of this Court in the *Texas, Virginian Railway, Jones & Laughlin, Brinkerhoff-Faris* and *Truax* cases, cited above, on an important constitutional and federal question in the administration of the amended act, and the resolution of that question by this Court is required.

II. SECTIONS 2(3), 2(11) AND 14(a) OF THE AMENDED ACT DENY PETITIONER AND THE SUPERVISORY EMPLOYEES WHOM IT REPRESENTS DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION BECAUSE THOSE

SECTIONS ARE BASED UPON AN ARBITRARY CLASSIFICATION WHICH BEARS NO REASONABLE RELATION TO THE PURPOSES OF THE LEGISLATION.

The court below held that the action of Congress in deciding as a matter of policy that in the enforcement of the National Labor Relations Act supervisory employees must be treated either as a part of management or as a part of the employees, and in treating them as a part of management, was based upon substantial and real considerations and was not an arbitrary or unjustifiable classification (R. 331). The court did not consider in its opinion the discrimination effectuated by the amended act among the following classes, all of whom have equal rights or who are, as employees, similarly situated:

1. Plant guards (Section 9(b)) and professional employees (Sections 2(12) and 9(b) of the amended act) are granted the protection of the amended act, while supervisors are denied it. But the former groups represent the interests of management no less than the latter and both are equally adverse to other employees. "In guarding the plant and personnel against physical danger, they (plant guards) represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer on matters affecting their own wages, hours and working conditions. As in the case of foremen, we see no basis in the Act whatever for denying plant guards the benefits of the statute when they take collective action to protect their collective interests. . . ." *National Labor Relations Board* v. *E. C. Atkins & Co.*, 67 S. Ct. 1265, 91 L. Ed. 1157, 1161. The amended act itself defines a guard as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." (Section 9(b)). And professional employees, such as time-

study personnel and time keepers, represent management's interests because they "help to fix the pace at which employees work and to determine the number of men the work calls for" (H. Rep't. No. 245, pp. 16-17). *In the Matter of Worthington Pump and Machinery Co. and Time Study and Motion Association*, Case No. 1 C 2874, 75 N. L. R. B. 678 decided January 2, 1948; *Art Metal Construction Company*, 75 N. L. R. B. No. 11. See also *Lumbermen's Mutual Casualty Co.*, 75 N. L. R. B. No. 129 (attorneys employed in claim department of insurance company held professional employees entitled to the protection of the amended act.)

As this Court has pointed out, in the *Packard* and *Atkins* cases *supra*, guards and supervisors both have independent, adverse and legitimate interests of their own, as employees, to protect in their dealings with the employer. Nevertheless, the amended act discriminatorily grants protection to guards and professional employees while denying that protection to similarly situated supervisors.

2. While supervisory employees are regarded as part of management and denied the protection of the amended act in their right to select representatives for the purposes of collective bargaining, management itself is granted the protection of the amended act in that right (Sections 8(b)(1)(B); 8(b) (2)-(6)), as are non-supervisory employees generally (Sections 8(a)(1)-(5)). The purported distinction between non-supervisory employees and supervisors who are in fact employees is based on the fallacious approach which elevates supervisors to the status of officers of the Company representing the stockholders and directors, not for the purpose of giving them the economic benefits of such officers, but for the sole and conceded purpose of denying them the rights as employees. (See *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 490). The distinction between management itself which is pro-

tected by the amended act and supervisors who by legislative fiat are made a part of management but denied the protection of the amended act, is a discrimination which enables management to command the time and abilities of supervisors with inadequate compensation and rests on no legitimate basis which would otherwise justify the classification.

3. Supervisors employed by employers subject to the amended act are denied the protection of the act while other supervisors subject to the Railway and Carriers by Air Labor Act (45 U. S. C. A. 151, Fifth, 151(a), First through Tenth) are protected in such rights, although as supervisors the status of both is identical. The only differences are that Congress has taken jurisdiction over different types of employers and that railway labor organizations are strong whereas supervisors' organizations in non-railroad industries are not.

4. The distinction between supervisors under the amended act, on the one hand, and employers, employees, plant guards and professional employees under the amended act, and supervisors under other federal legislation, on the other hand, goes deeper than a classification based on status, and discriminates between the two groups with respect to remedy. The second group is protected by the administrative machinery of federal legislation, and, in the case of supervisors subject to the Railway and Carriers by Air Labor Act, by access to the District Courts and by the penal provisions of 45 U. S. C. A. 152 Tenth. Supervisors under the amended act are denied not only the protection of the federal administrative agency, but all remedies that may be anywhere invoked for the protection of the self-same rights. (See Point I, *supra*). Such discrimination, moreover, is contrary to the purposes of the amended act. The denial of the right of supervisors to organize, which occurred during the

years of "inaction, vacillation and division" of the Board, under the original act (See *Packard Motor Car Co.* v. *National Labor Relations Board, supra*), has led, as the Board has found, to an increase in industrial strife, *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4, Tenth Annual Report of National Labor Relations Board, p. 31. The purpose of the amended as well as the original act is to decrease industrial strife (Section 1 of the original, Section 1 and 101 of the amended act). The evidence cited by the framers of the amendment that the organization of foremen has led to an increase in industrial strife is limited to an isolated instance and is contrary not only to the general experience which led to all prior federal legislation in the field but to the great weight of specific evidence with respect to supervisors under the original act. (See H. Rep't No. 245 on HR 3020, *supra*, at p. 14; Section 1 of the amended act App. p. 27.)

The court below, without adverting to the foregoing instances of discrimination, relied on classifications in the original act, which exempted agricultural, domestic employees, and individuals employed by parent or spouse from the coverage of the original and amended acts, and the exemption of other classes of employees from the coverage of federal wage and hour, social security, and workmen's compensation acts (R. 330-331). But the exemptions from the original act were based on the theory that the exempted employees were employed by intra-state employers, whose controversies were of purely local significance (S. Rep't No. 573, to accompany S. 1958 74th Cong., 1st Sess., p. 7; H. Rep't No. 972, on S 1958) 74th Cong. 1st Sess., pp. 8-9) and the exempted employees were not denied remedies under any law, national or local relating to collective bargaining, as are supervisors here. The exemption of other employees from the coverage of other acts relates to rights of an entirely different nature from the constitutional and

preferred rights safeguarded by the original act. Employees have no constitutional right to be included in a social security system, or to minimum hours and minimum wages, to be fixed by an administrative tribunal or to a federal workmen's compensation system. Employees do have a constitutional right to self-organization, for which *all* protection may not be denied (See Point I, *supra*).

Thus, the classification between supervisors, under the amended act, on the one hand, and others similarly situated, on the other hand, is discriminatory, based on no justifiable distinctions, bears no reasonable relation to the purposes of the legislation, and is injurious to supervisors since it places them beyond the only machinery, both national and local, available for the peaceful settlement of industrial disputes and forces them either to relinquish their constitutional rights or to resort to self-help and industrial warfare to secure them.

It is well recognized that discrimination may be of such an injurious and arbitrary character as to bring into operation the due process clause of the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531; *Minski* v. *United States,* 131 F. 2d 614 (C. C. A. 6th, cert. denied 319 U. S. 775, ruling aff'd, 319 U. S. 463); *Currin* v. *Wallace,* 306 U. S. 1, 14; *Barbier* v. *Connally,* 113 U. S. 27. Here, the discrimination between supervisors under the amended act, on the one hand, and employers and employees under the amended act and supervisors under other federal legislation, on the other hand, falls within the constitutional ban. Even if contrary to our contention in Point I the amended act does not withdraw from supervisors all remedy for employer invasion of their rights, but merely remedies before national and local administrative agencies, the due process clause requires equality of treatment in this respect, as much as in the respect that every man shall have the benefit of his day

in court and the benefit of the general law, *Truax* v. *Corrigan*, 257 U. S. 312, 330, 332 and cases cited.

The *Truax* case, *supra*, raises, and we submit, correctly decides in petitioner's favor, the legal issues under both of the foregoing Points. In that case, this Court held invalid, under the due process and equal protection clauses of the Fourteenth Amendment, an Arizona statute which forbade the state courts to issue injunctions against picketing in labor disputes by means which this Court termed illegal, although non-violent. The grounds were first, that the statute denied all remedies for the protection of a property right of the employer picketed, when the state could not constitutionally destroy that right,[4] (see Point I, *supra*), and second, even if the statute forbade only injunctive relief, it discriminated against such an employer, by withholding access to the courts for injunctive relief for him which was available to others for the protection of the same right.[5] (See Point II, *supra*). The principle of the *Truax* case is applicable to the case at bar, even though the means which this Court there held illegal may now be interpreted otherwise.

In the case at bar, the findings and admissions on which Sections 1(a), 1(b) and 2(c) of the Board's Order rest include the following:

> "Robert Erwood, Director of Personnel and Plant Manager Walton told them (three foremen) 'you either got to resign as officers of the Union or resign from the

[4] "To give operation to a statute whereby serious losses inflicted by such unlawful means are, in effect made, remediless, is we think to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law" (*ibid* at p. 330).

[5] "Here is a direct invasion of the ordinary and business rights of a person, unlawful when committed by anyone, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws" (and hence the spirit of equality embodied in the due process clause), "then it is hard to conceive what would be" (*ibid*, 335, 331).

> Company' . . . 'You fellows cannot belong to it (the Union) and work for Budd.' They were requested to stop all organizational activity . . . they finally informed . . . Erwood they would resign from office. Later they did so and notified Erwood accordingly.
>
> "Subsequently, all foremen . . . were also told that they did not need a union, that respondent did not want them to belong to a union and that respondent was opposed to a union of foremen (R. 34-35).
>
> "In its answer, respondent 'admits that it laid him (Owens) off and refused to reemploy him and alleges the reason to be that he attempted to organize members of the Company's supervision into a labor organization and that when warned that continuation of such action would result in his being laid off, he agreed to discontinue such activities, but failed to do so, whereupon he was laid off' " (R. 38, 54).

But for the provisions of the amended act here challenged, this conduct would clearly be illegal.

The contrary decision of the court below has thus not given proper effect to applicable decisions of this Court on an important question relating to the application and construction of the Constitution and federal statutes, which has not been but should be settled by this Court.

Conclusion

The court below refused to enforce the order of cessation of unfair labor practices in Section 1(a), 1(b) and the correlative notice provisions of 2(c) of the Board's Order of January 30, 1946, as enforced in its prior decree of June 3, 1947, because "We believe that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union and to interfere with their union activities. The cease and desist provisions of the Board's Order would enjoin the respondent from engaging in conduct in the future which is now lawful. They should, accordingly, be

set aside" (R. 333). But such employer invasions of the constitutional rights of supervisors are lawful only because the amended act in Sections 2(3), 2(11) and 14(a) purports to deny all remedies national or local, under any law relating to collective bargaining for the protection of those rights, in contravention of the due process clause of the Fifth Amendment (See Point I, *supra*), and because the amended act in those sections so injuriously discriminates against supervisors employed by employers subject to the amended act, as to fall athwart the equal treatment requirement of the due process clause of the Fifth Amendment (Point II, *supra*). Otherwise such violations are clearly unlawful.

These sections of the amended act are, therefore, unconstitutional and are no barrier to the enforcement of the order of the Board under the original act as originally enforced by the court below in its decree of June 3, 1947. *Davis* v. *Wallace*, 257 U. S. 478; *Eberle* v. *Michigan*, 232 U. S. 700; 11 *American Jurisprudence*, 841; *Packard Motor Car Co.*, v. *National Labor Relations Board, supra.*

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX

Statutes Involved

National Labor Relations Act of 1935 (July 5, 1935, C. 372, Sec. 7, 49 Stat. 449, 452, 29 U. S. C. 157)

"Sec. 157. *Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. July 5, 1935, c. 372, Sec. 7, 49 Stat. 452."

Labor Management Relations Act, 1947 (Public Law 101, 80th Cong., Ch. 120 1st Sess. 29 U. S. C. 151 et seq.)

"SHORT TITLE AND DECLARATION OF POLICY

"Section 1. (a) This Act may be cited as the 'Labor Management Relations Act, 1947.'

"(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which

affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

"Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

" 'FINDINGS AND POLICIES

" 'Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . ."

" 'The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

" 'Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

" 'It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation

of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.''

'' 'DEFINITIONS

'' 'Sec. 2. When used in this Act—

'' '(3) The term ''employee'' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.''

'' '(11) The term ''supervisor'' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.''

'' 'RIGHTS OF EMPLOYEES

'' 'Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such

right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

" 'PREVENTION OF UNFAIR LABOR PRACTICES

" 'Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

" 'Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purposes of any law, either national or local, relating to collective bargaining."

Norris LaGuardia Act. (Public No. 65, 72nd Cong. 29 U. S. C. 102)

"Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property or organized in the corporate and other forms of ownership association, the individual unorganized worker

is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

Judicial Code, Section 24 amended (28 U. S. C. (1948 ed.) 1337)

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies," 28 U. S. C. 1940 ed. Section 41 (8) (23) (March 3, 1911, ch. 231, Section 24, Pars. 8, 23, 36 Stat. 1092, 1093; Oct. 22, 1913, ch. 32, 38 Stat. 219; 28 U. S. C. Section 1337, Reviser's Notes p. 1838.)

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 415.

FOREMAN'S ASSOCIATION OF AMERICA, *Petitioner*,

v.

EDWARD G. BUDD MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD, *Respondents*.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Pursuant to paragraph 4(a) of Rule 38 of the Rules of this Court, petitioner submits this Reply Brief in Reply to the Briefs in Opposition filed by the National Labor Relations Board and Edward G. Budd Manufacturing Company, Respondents.

I.

Both the Board (Board's Brief p. 4, ftn. 1, p. 5) and the Company (Company's Brief p. 26) take the position that petitioner's petition for certiorari in *Foreman's Association of America* v. *L. A. Young Spring and Wire Corp.*, which was denied in 333 U. S. 837, raised questions which are substantially similar to those presented by the petition herein and were disposed of by this Court adversely to petitioner. This position is unfounded.

The *L. A. Young* case involved an order of the Board entered under the National Labor Relations Act of 1935 which directed the Young Company to cease and desist from refusing to bargain collectively with the Foreman's Association of America. As a corollary to this order of cessation, and without any other independent grounds, the Board ordered the Company to cease and desist from interfering with, restraining and coercing its employees in the exercise of their rights under Section 7 of the original Act. The case before the Board thus involved only the collective bargaining provisions of the original act and required the respondent not merely to refrain from illegal acts but to meet and take affirmative action with respect to bargaining with the Association.

The Young Company petitioned the United States Court of Appeals for the District of Columbia to review and set aside the Board's order and the Board cross-petitioned for enforcement. After the case was orally argued by the Board and Company, the amended act became effective, and that Court, on the strength of the intervening legislation but without further argument or briefs on its effect or validity, entered its judgment denying enforcement of the Board's Order. (163 F. 2d 905) The Association then moved that Court for leave to intervene and for rehearing. The court denied this motion.

The Association then petitioned this court for writ of certiorari to review the order denying the motion for leave to intervene and to review the judgment of the Court of Appeals. The Association's principal contention, and the only point advanced in its statement of the reasons for granting the writ, was that the order denying the motion to intervene constituted an abuse of discretion, reversal of which was necessary for the preservation of this Court's appellate jurisdiction over the remaining questions presented, but not argued, by the petition. (Petition in No. 502, October Term, 1947, pp. 7-12)

In the case at bar, the order of the Board in question does not involve the collective bargaining provisions of either the original or the amended act, but is grounded on a discriminatory discharge and independent findings of interference, restraint and coercion. The Sixth Circuit upheld these findings, enforced the correlative cease and desist provisions of the Board's Order and granted the Association's motion for leave to intervene. In its Order of December 15, 1947 (332 U. S. 840), on the Company's petition for writ of certiorari, this Court granted the petition of the Association to intervene, which raised the question of the unconstitutionality of the amended act, as related to supervisory employees; granted certiorari; and remanded to the cause to the Sixth Circuit for consideration of the effect of the Labor Management Relations Act on the validity of that part of the Order of the Board which directed the Company to cease and desist from discouraging membership in the Association.

The *Young* case, therefore, differs from the case at bar in respect to (1) the sections of the original and amended acts involved under the Board's order of cessation; (2) the standing of the Association which was denied intervention in the Court of Appeals for the District of Columbia in the *Young* case but granted intervention by the Sixth Circuit and by this Court in this case; (3) the nature of the questions presented and argued on the petition in the *Young* case, which was principally concerned with the question of intervention, and the questions presented and argued in the petition in this case, which directly raises the constitutional issues involved in the applicable sections of the amended act; and (4) the opinion of the Court of Appeals in the *Young* case, which was written without the benefit of briefs or argument on the validity of the applicable sections of the amended act, and the opinion of the Sixth Circuit in the case at bar, which, pursuant to grant of certiorari and specific remand from this Court, undertakes to construe the constitutionality of these sections.

The denial of the petition for writ of certiorari in the *Young* case does not import any expression of opinion on the merits of the questions presented. *Sunal* v. *Large,* 332 U. S. 184. *A fortiorari,* where, as here, the questions presented are so substantially different, and arise under such different conditions from those involved in the *Young* case, the denial of certiorari in that case is wholly without effect as precedent.

The Board further contends that the provisions of the amended act with respect to supervisors were also considered in *National Labor Relations Board* v. *Brown and Sharpe Mfg. Co.,* 169 F. 2d 331 (C. C. A. 1) which impliedly upheld the constitutionality of these sections. The *Brown and Sharpe* case involved an order of the Board, issued under the original act, requiring the Company to bargain with representatives of "time study" men, excluding supervisors. The Board sought enforcement of its Order, after the enactment of the amended Act. The court held that the "time study" men were not "supervisors" within the meaning of Sections 2(3) and (11) of the amended act, but remanded the case to the Board to make findings and reach conclusions with reference to the situation under the amended act. The Court did not consider the constitutionality of Sections 2(3) and 2(11), and did not even refer to Section 14(a) of the amended act, which is the gravamen of the petition for certiorari in the case at bar.

II.

Section 14(a) of the amended act provides that ". . . no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining". Petitioner contends that this section deprives not only the Board but all state agencies, including the state labor relations boards, and all courts, including the federal district courts, of jurisdiction to remedy violations of the constitutionally protected and legislatively

guaranteed rights of supervisors to self organization and that such a complete deprivation of remedy for such rights constitutes a denial of due process. (Petition pp. 9-17)

Without controverting petitioner's interpretation of Section 14(a), the Board contends merely that the question of the validity of this section is not properly before this Court, because the decree below was a remedy provided in the original act and "whether Congress could or could not constitutionally deprive state or federal courts of power to protect foremen in the exercise of their right to organize and bargain collectively cannot be decided in this case." (Gov't Brief pp. 5-6). The Board therefore denies the applicability of such cases as *Brinckerhoff-Faris Trust and Sav. Co.* v. *Hill,* 281 U. S. 673, 682 and *Truax* v. *Corrigan,* 257 U. S. 312, 330, 332, cited by petitioner in support of its contention. (Gov't Brief pp. 5-6, Petition 16, 17)

This Court, however, granted certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs petitioner to cease and desist from discouraging membership" in the Association and remanded the case for "consideration of the effect of the Labor Management Relations Act of 1947 . . . on the question to which the grant of certiorari is limited." (332 U. S. 480)

The court below—correctly, we believe—rejected the contention that "the mandate of the Supreme Court does not require or permit us to pass upon the constitutionality of the Labor Management Relations Act." It held (R. 329) that "The constitutionality of the Act was put in issue in general terms by the motion of Foreman's Association before the Supreme Court to intervene. . . . We are of the opinion that a consideration of the validity of the order, because of the enactment of the Act, necessarily involves the question of whether the Act is constitutional and valid." (citing cases)

Where the mandate of this Court directs a review of the validity of an order enforcing rights under the original

act, in the light of the effect, upon that order, of the amended act which purports to obliterate the remedy provided by that order and any other remedy for the violation of fundamental rights, we submit that the constitutional validity of the amended act is properly before this Court.

The Board (Board's Brief p. 6) and the Company* (Company's Brief pp. 12-15) also contend that the Railway Labor Act cases (*Texas & N. O. R. R. Co.* v. *Brotherhood*, 281 U. S. 541; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515), relied on by petitioner, are inapposite because "those cases dealt with the enforcement of statutory commands here absent".

The amended act, however, does not eliminate the legislative declaration of the rights of employees or the statutory command that employees are to be protected in the exercise of their rights (Sections 1 and 7 of the amended act, section 2 of the Norris La Guardia Act, Petition pp. 9-10). It purports merely to define the term employee, "when used in this Act" as not to include any individual employed as a supervisor (Section 2(3)) and then to deprive supervisors of all remedies that may be anywhere invoked to protect their constitutionally protected and legislatively guaranteed rights as employees. Under the original act and for purposes of other legislation, supervisors were and are employees, protected by both the legislative guarantee and the administrative provisions of the original act. *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485. The court below held that the amended act did not restrict the fundamental rights of supervisors but "merely changed the statutory method of

* The Company apparently argues that the Board's order involves the collective bargaining provisions of the amended act (Company's brief pp. 10, 13). This is error. The order requires the company to refrain from interference, restraint and coercion and from discriminatory discharges. There is no requirement that it meet and take affirmative action with respect to bargaining with the Association (R. 55, 321).

enforcing those rights." (R. 329) If the change in the statutory method of enforcement had merely deprived supervisors of remedies before the Board, the legislative declaration of their rights having been unchanged, supervisors would have had the same remedies in the federal district courts as were available to complainants in the *Texas* case, *supra*. But Section 14(a) of the amended act deprives supervisors not only of remedies before the Board but of all other remedies for violations of their rights. Under the doctrine of the *Brinckerhoff-Faris, Truax* v. *Corrigan* and *Texas* cases, *supra*, we submit that such a complete deprivation of remedies constitutes a denial of due process.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 415

FOREMAN'S ASSOCIATION OF AMERICA, PETITIONER

v.

EDWARD G. BUDD MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below setting aside a portion of the Board's order (R. 322-333) is reported in 169 F. 2d 571. The prior decree of the court below, enforcing the Board's order (R. 321), is reported at 162 F. 2d 461. The order of this Court, denying certiorari in part and granting certiorari in part, vacating the portion of the decree below as to which certiorari was granted

and remanding to the court below is reported in 332 U. S. 840. The decision and order of the Board (R. 53-58) is reported in 65 N. L. R. B. 612.

JURISDICTION

The judgment of the court below, following the remand from this Court, was entered on August 16, 1948 (R. 322). The petition for a writ of certiorari was filed on November 13, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and 28 U. S. C. 1651.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (Supp. I) 141, *et seq.*) are set forth in the Appendix, *infra,* pp. 10-16.

QUESTION PRESENTED

Whether Sections 2 (3), 2 (11), and 14 (a) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, which exclude individuals employed as supervisors from the term "employee" as used in the Act, violate the Fifth Amendment to the Constitution of the United States.

STATEMENT

Following the usual proceedings under the National Labor Relations Act, the Board, on January 30, 1946, issued its decision and order, directing,

inter alia, that the Edward G. Budd Manufacturing Company "Cease and desist from: (a) Discouraging membership in the Foreman's Association of America * * *; (b) In any other manner interfering with, restraining, or coercing its supervisory employees in the exercise of [their rights] * * * as guaranteed in Section 7 of the Act" (R. 55). This order was enforced by the court below in a decree entered June 3, 1947, "on the authority of" *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485 (R. 321). On June 23, 1947, Congress enacted the Labor Management Relations Act, 1947, amending the provisions of the National Labor Relations Act. The Budd Company thereafter filed a petition for a writ of certiorari (No. 301, October Term, 1947), relying on the changes which the new Act made in the law with respect to supervisory employees. The Foreman's Association petitioned for leave to intervene to urge the unconstitutionality of the new Act. This Court granted the petition to intervene, granted certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs petitioner to cease and desist from discouraging membership in the Foreman's Association of America," and remanded the cause to the court below "for consideration of the effect of the Labor Management Relations Act of 1947 * * * on the question to which the grant of certiorari is limited." *Ed-*

ward G. Budd Manufacturing Co. v. *National Labor Relations Board,* 332 U. S. 840.

In response to the mandate of this Court, the court below considered both the effect of the new Act upon the Board's order and the grounds advanced by the Foreman's Association assailing the constitutionality of the new Act. The court held that "The cease and desist provisions of the Board's order would enjoin the respondent from engaging in conduct [interference with foremen's union activity] in the future which is now lawful. They should, accordingly, be set aside" (R. 333). The court upheld the constitutionality of the new Act with respect to each of the several grounds upon which it was attacked (R. 328-332).

ARGUMENT

The judgment of the court below, upholding the constitutionality of Sections 2 (3), 2 (11) and 14 (a) of the Labor Management Relations Act of 1947, is clearly correct and does not conflict with the decision of any other court of appeals.[1]

---

[1] The provisions of the amended Act with respect to supervisors were considered by the courts in *National Labor Relations Board* v. *Brown and Sharpe Mfg. Co.*, 169 F. 2d 331 (C. C. A. 1) and *L. A. Young Spring and Wire Corp.* v. *National Labor Relations Board,* 163 F. 2d 905 (App. D. C.), certiorari denied, *sub. nom. Foreman's Association of America* v. *L. A. Young Spring & Wire Corp.*, 333 U. S. 837. The constitutionality of these sections was impliedly upheld by the courts of appeals in the *Young* and *Brown* cases, and was expressly but unsuccessfully challenged by the present petitioner in its petition for a writ of certiorari in the *Young* case, which raised questions substantially similar to those presented in the petition in this case.

There is, therefore, no occasion for review by this Court.

1. Petitioner argues that the new Act deprives foremen of due process of law, contending that it precludes them from asserting their constitutional right to organize and bargain collectively not only before the National Labor Relations Board but also before state labor relations boards and before the courts (Pet. 13-17). Petitioner concedes that Congress could withdraw the remedies provided in the original National Labor Relations Act (Pet. 11-12), but contends that Congress cannot constitutionally withdraw from supervisory employees the protection afforded their right to organize and bargain collectively by state labor relations boards and by state and federal courts. This question is not properly before this Court because the decree below was a remedy provided in the original National Labor Relations Act. Whether Congress could or could not constitutionally deprive state or federal courts of power to protect foremen in the exercise of their right to organize and bargain collectively cannot be decided in this case.

Petitioner's reliance upon such cases as *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 682, and *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 426-432 (Pet. 9, 16-17), dealing with deprivations of property without opportunity for judicial review, or *Truax* v. *Corrigan,* 257 U. S. 312, 330, 332

(Pet. 9, 16-17, 23), dealing with the denial of recourse to the courts for the defense of common law or equitable rights, is based on the assumption that it may here try the validity of that portion of Section 14 (a) of the Act as amended, which petitioner interprets as depriving all federal and state courts of jurisdiction to protect foremen in their organizational rights. Since, as petitioner concedes (Pet. 11-12), Congress could withdraw the remedies of the National Labor Relations Act from foremen, such cases have no relevance here. Equally inapposite are *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks,* 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, likewise relied on by petitioner, for those cases dealt with the enforcement of statutory commands here absent. See *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 300-301.

2. Petitioner here renews the contention, unsuccessfully advanced in its petition for a writ of certiorari in *Foreman's Association of America* v. *L. A. Young Spring & Wire Corp.,* 333 U. S. 837, that the exclusion of supervisors from the definition of "employee" is so discriminatory as to be an abuse of legislative power and therefore violative of the Fifth Amendment (Pet. 17-24). Congress can, for its purposes, set up classifications of persons and differentiate in the treatment of the various classes, so long as all persons within each class are treated alike. Thus, Congress in the

Social Security Act (42 U. S. C. 409, 1107) exempted and excepted certain classes of persons from the operations of the statute, such as agricultural, charitable, domestic and educational employees and employees of employers employing less than eight persons, and this Court has upheld such differentiation of treatment. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509-513; *Helvering* v. *Davis,* 301 U. S. 619, 646; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584-585. Similarly, exemptions such as administrative, agricultural, and professional employees, outside salesmen, seamen, fishermen, and employees of certain small newspapers, under the Fair Labor Standards Act (29 U. S. C. 213) have been held to be valid. See *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178, 184. It is therefore evident that Congress, within its constitutional power to regulate commerce, could include supervisors as employees under the Act, *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485, or exclude them as it has by the recent amendments. As this Court stated in the *Packard* case, "it is for Congress, not for us, to create exceptions or qualifications at odds with [the Act's] plain terms" 330 U. S. at 490.[2] See also *Wickard* v. *Filburn,* 317

[2] When the *Packard* case was being considered, no one argued that the position subsequently taken by the minority of this Court would be unconstitutional. Nor did the Board, in grappling with the problem of the interpretation of "employee" under the original Act, ever consider that any constitu-

U. S. 111; *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Cases* v. *United States*, 131 F. 2d 916 (C. C. A. 1), certiorari denied *sub nom. Velazquez* v. *U. S.*, 319 U. S. 770; *Taylor* v. *Brown*, 137 F. 2d 654 (Em. Ct. App.)

In disposing of an analogous contention under the Fifth Amendment in *Currin* v. *Wallace*, 306 U. S. 1, 14, this Court noted that "There is no requirement of uniformity in connection with the commerce power," and continued:

> It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continuance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power.

Here Congress did "consider and weigh relative situations and needs" and concluded that the

---

tional issue might be involved. *Matter of Union Collieries Coal Co.*, 41 N. L. R. B. 961 and 44 N. L. R. B. 165; *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733; *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4. For a detailed report of the Board's considerations of the supervisor problem, see *Tenth Annual Report of the National Labor Relations Board*, 1945, pp. 30-34.

"real balance of power in the collective-bargaining process" might be upset if labor organizations were permitted to continue invoking the Act "for covering supervisory personnel, traditionally regarded as part of management." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 3-4. Accordingly, petitioner's attempt ~~to~~ to have this Court inquire into the reasonableness of, and the necessity for, Congress' action in excluding supervisors must fail.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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DECEMBER 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et. seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

3. The term "employee" shall include any employee, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the

circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. (Supp. I) 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—

* * * * *

"(3) The term 'employee' shall include any employee, * * * but shall not include any individual employed * * * as a supervisor, * * *.

* * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

"SEC. 10. * * * (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question

occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals

of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this

Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

* * * * *

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 415

FOREMAN'S ASSOCIATION OF AMERICA,
Petitioner,
vs.
EDWARD G. BUDD MANUFACTURING COMPANY
and
NATIONAL LABOR RELATIONS BOARD,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals, Sixth Circuit

BRIEF FOR EDWARD G. BUDD MANUFACTURING COMPANY IN OPPOSITION

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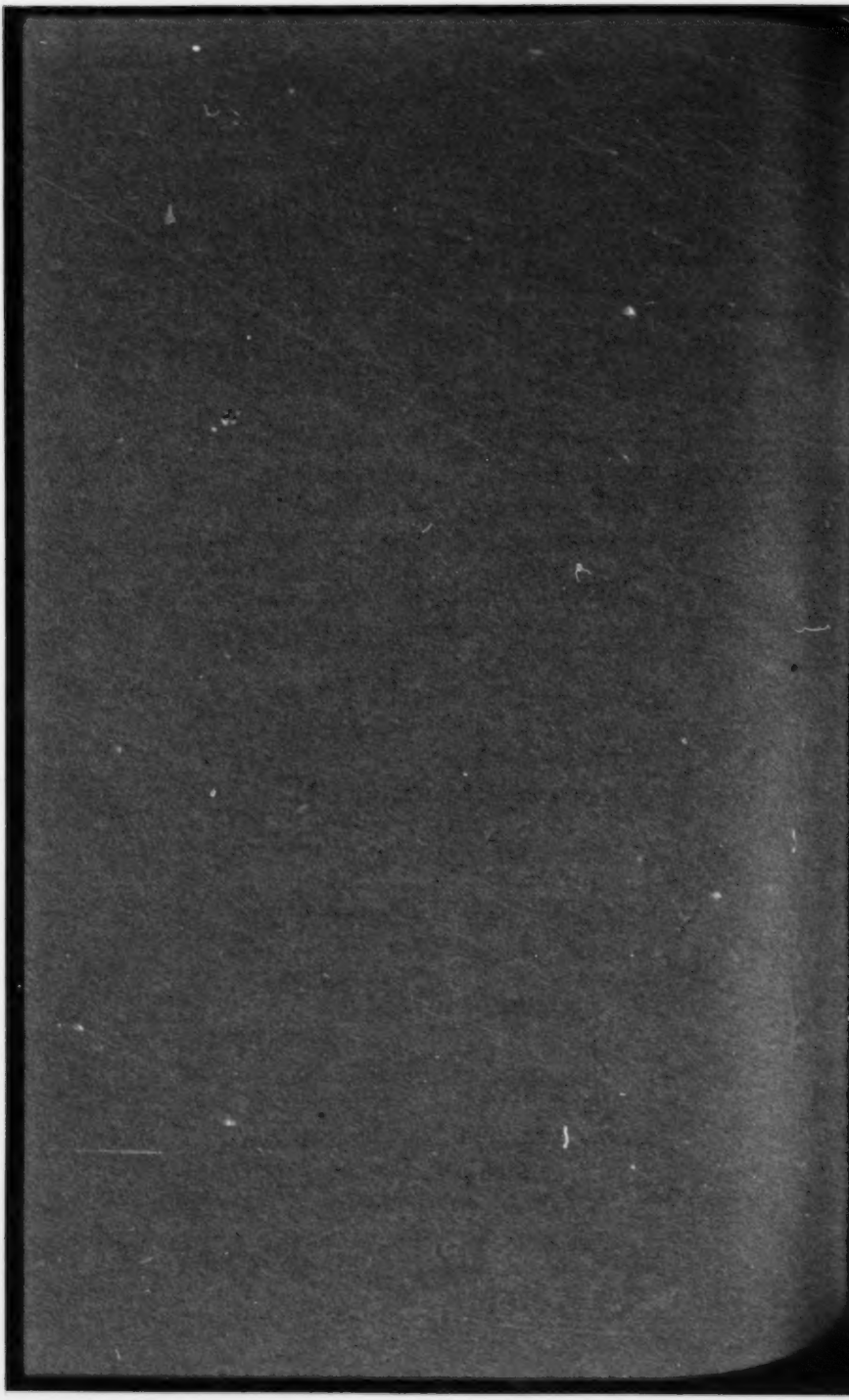

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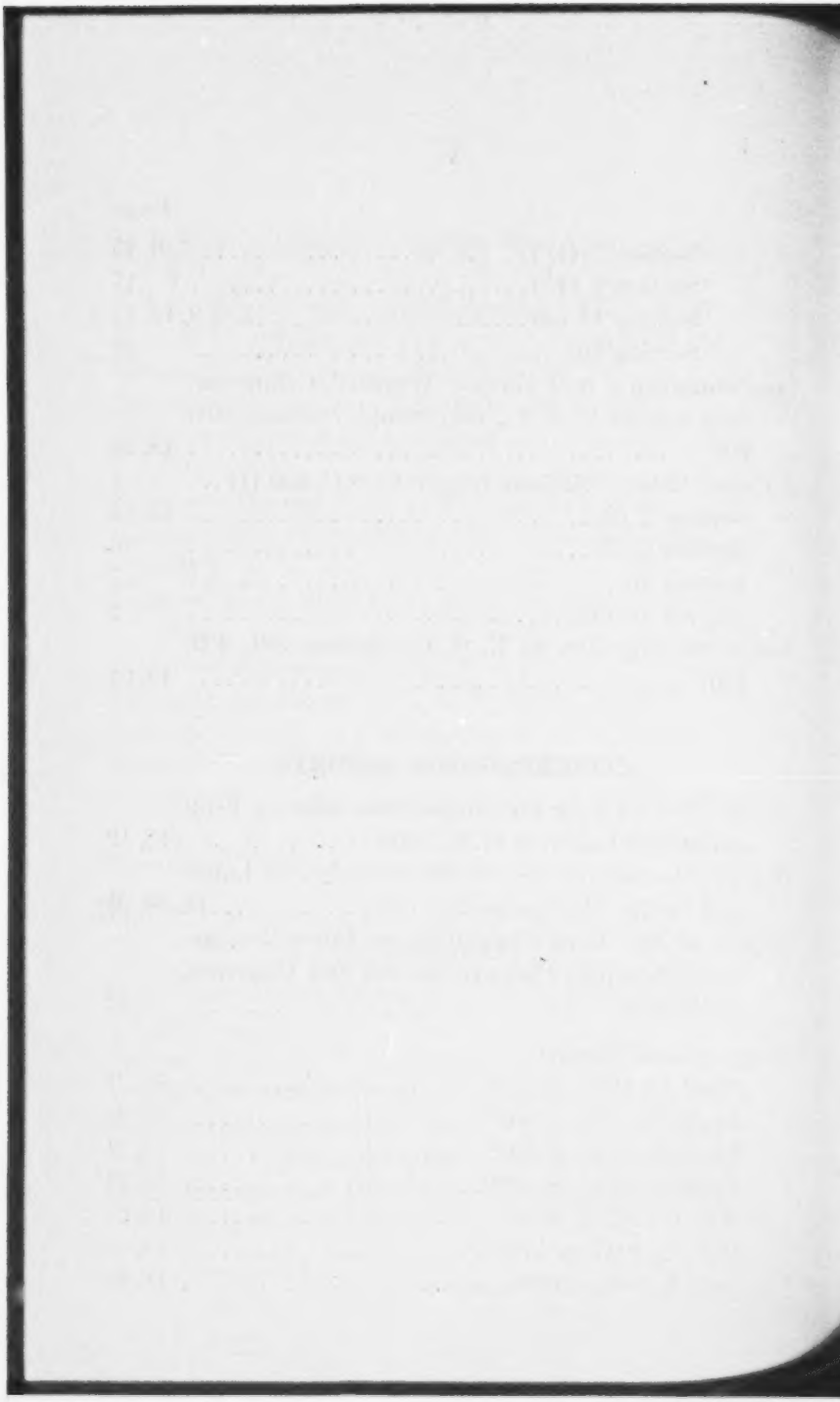

In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 415

FOREMAN'S ASSOCIATION OF AMERICA,
Petitioner,
vs.
EDWARD G. BUDD MANUFACTURING COMPANY
and
NATIONAL LABOR RELATIONS BOARD,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals, Sixth Circuit

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BRIEF FOR EDWARD G. BUDD MANUFACTURING COMPANY IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and the order of the National Labor Relations Board (R. 53-58, 31-47) are reported in 65 N. L. R. B. 612.

The first decree of the court below, entered June 3, 1947, appears at R. 321 and is reported at 162 F. 2nd 461.

Upon petition of the Company, the Supreme Court granted its writ of certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs the petitioner to cease and desist from discouraging membership in the Foreman's Association of America," vacated the decree of the lower court in that respect, and remanded the cause to the lower court "for consideration of the effect of the Labor Management Relations Act of 1947, 61 Stat. 136, on the question to which the grant of certiorari is directed." 332 U. S. 840, (The Foreman's Association of America was allowed to intervene by this Court upon the granting of the writ of certiorari.)

The lower court entered its opinion on remand on August 13, 1948. It appears beginning at R. 321 and is reported in 169 F. 2d 571.

JURISDICTION

A copy of the instant petition for certiorari was served on counsel for the Company on November 23, 1948.

Petitioner avers that it invokes the jurisdiction of this Court "under Section 240 of the Judicial Code, 28 U. S. C., Section 1254, and Section 262 of the Judicial Code, 28 U. S. C., Section 1651, and under Section 10 (f) of the National Labor Relations Act, 29 U. S. C. 160 (f)."

STATEMENT OF THE CASE

The Company accepts the facts set forth in "Statement of Matters Involved" in the Association's petition, beginning at page 4. But there should be added the fact that immediately after this Court issued its writ of certiorari, and in accord therewith, the Company complied with that portion of the Board's order requiring the reinstatement of one employee with back pay. Also, that the Board filed a brief on remand, and argued orally, that the 1947 amendments to the National Labor Relations Act were constitutional and that the effect of this Court's order on remand was to vacate "that portion of the decree of this Court which enforces both the cease and desist provisions of the Board's order (paragraphs 1 (a) and 1 (b)" (R. 55). (Board's Brief on Remand, p. 3-6.)

ARGUMENT

The petition of the Association and its brief are aimed at the proposition that the 1947 amendments of the National Labor Relations Act have deprived supervisors of remedies to force employers to bargain collectively with them.

Petitioner suggests "the holding of the court below that the deprivation of all such remedies is constitutionally valid raises a federal question of general importance relating to the construction and application of the Constitution and federal statutes, which * * * does not give proper effect to applicable decisions of this Court and which has not been but should be, in the public interest, settled by this Court" (p. 9 of its Brief).

But what petitioner has in reality done in its brief is to repeat the arguments it urged in the lower court, overlooking the admonition of Chief Justice Taft, speaking for the Court in *Magnum Import Co. v. Coty,* 262 U. S. 159, 163, that "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

I.

THE DECISION BELOW GIVES PROPER EFFECT TO APPLICABLE DECISIONS OF THIS COURT

The petitioner urges: (A) That Sections 2 (3), 2 (11) and 14 (a) of Section 101 of the amendments to the National Labor Relations Act (contained in the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., 1947 Cum., Sections 152 (3), 152 (11) and 164 (a)), deny due process of law to petitioner and to the supervisory

employees it represents for the reason that the sections deprive supervisors "of all existing remedies in all federal agencies, including the district courts, and in all state and local agencies, including the State Labor Relations Boards, for the redress of employer violations of Constitutional rights which neither Congress nor the courts have power to abridge or destroy, and no real opportunity exists elsewhere for the protection of those rights" (p. 8 of the Petition). (B) Further, that these sections of the amended act deny due process because they "are based upon an arbitrary classification which bears no reasonable relation to the purposes of the legislation" (pp. 17, 18 of the Petition). (C) The sections, being unconstitutional, paragraphs 1 (a) and (b) of the Board's order (R. 55) should be enforced (pp. 7, 24 of the Petition).

We reply to these *seriatim*.

A. The claim of the Association that Sections 2 (3), 2 (11) and 14 (a) of the Amended Act deny it, and the supervisory employees whom it represents, due process of law because the sections deprive supervisors "of all existing remedies in all federal agencies, including the district courts, and in all state and local agencies, including the State Labor Relations Boards, for the redress of employer violations of Constitutional rights which neither Congress nor the courts have power to abridge or destroy, and no real opportunity exists elsewhere for the protection of those rights."

Section 2 (3) of the amended Act, in defining the term "employee," excludes supervisors from the coverage of the Act. Section 2 (11) defines the term "supervisor." Section 14 (a) provides in part that nothing in the Act "shall prohibit any individual employed as a supervisor

from becoming or remaining a member of a labor organization * * *." The Association is not complaining about that portion of Section 14 (a). Subsection (a) then continues, stating that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

It is the latter portion of this subsection to which the Association objects in the first portion of its argument.

(1) States under the N. L. R. A. had no jurisdiction over supervisors under that Act.

As far as that part of Section 14 (a) is concerned which provides that an employer subject to the Act is not required to recognize supervisors as employees under any state statute, for the purpose of collective bargaining, it should be noted that the language is directed only to employers under the Act and that such an employer is not prohibited from bargaining with supervisors under either the federal or a state statute if the employer so desires. But, more important, is the fact that under the National Labor Relations Act, prior to amendment, supervisors covered by the Act did not have recourse to any "local" law if the employer objected. The jurisdiction of the National Labor Relations Board over supervisors was held to be exclusive. *Bethlehem Steel Co. v. New York Labor Relations Board,* 330 U. S. 767.

So that the lower court's decision is in accord with this Court's holding and the amendment contained in the latter portion of Section 14 (a), as far as state statutes are concerned, only spells out the law as it existed prior to the amendment.

(2) Supervisors under the 1935 N. L. R. A. did not have the right to initiate proceedings in the United States courts.

As to the Association's further claim (p. 8 of its brief) that the effect of taking supervisors out from under the Act is to deprive them of the right to use the United States courts to enforce collective bargaining, the lower court applied the law as enunciated by this Court.

Supervisors under the 1935 Act did not have that right, as interpreted by this Court.

Section 10 of that Act, as well as the same section in the 1947 amendments, limits the right of court review of an order of the Board to action initiated either by the Board or the employer. In fact, Section 9 of the 1935 Act stated that the power of the Board to prevent unfair labor practices is exclusive.

A federal district court does not have equity jurisdiction to enjoin the Board from holding a hearing upon a Board complaint against an employer charging him with an unfair labor practice. *Myers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41; *Newport News Shipbuilding Etc., Co. v. Schauffler,* 303 U. S. 54.

Nor is a labor organization entitled to review in the courts of a certification by the Board of a bargaining agency. *American Federation of Labor v. National Labor Relations Board,* 308 U. S. 401; *National Labor Relations Board v. International Brotherhood of Electrical Workers,* 308 U. S. 413.

(3) The Federal Constitution does not give employees the right to organize and to select representatives for collective bargaining.

The Constitution of the United States contains no provision giving employees the right to organize and to select representatives for collective bargaining or other mutual aid or protection.

True, the First Amendment does provide in part that "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of people peaceably to assemble * * *." But the most that can be said is that this amendment only provides certain protections to employees in organizing and in selecting their representatives.

The right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection is "a fundamental right." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U. S. 261, 263. "The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees *the rights established by Section 7* to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes." (Emphasis supplied herein unless otherwise indicated.) *National Labor Relations Board v. Pa. Greyhound Lines, Inc.*, 303 U. S. 261, 265.

On the other hand, the Federal Constitution expressly gives to Congress power to regulate commerce with foreign nations, among the states, and with the Indian tribes (Article I, Section 8). This Court has held, as

has just been shown, that it is under this power that Congress acted in enacting the National Labor Relations Act of 1935. The same must be true of the amendments to that Act enacted in 1947.

So that the lower court in upholding the constitutionality of Sections 2 (3), 2 (11) and 14 (a) but followed those decisions.

(4) The right to organize and to select representatives is not disturbed by the 1947 Act.

The lower court properly held that the rights of employees to self-organization and to select representatives of their own choosing is not disturbed by the 1947 Act. The Act does not state that supervisors must not exercise such rights. In fact, Section 14 (a) expressly says that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization."

As the Board said in its brief on remand (p. 17),

> "There is nothing in the amended Act which restricts the right of supervisors to express opinions, and Section 14 (a) specifically reserves to them the right to form and join labor organizations. Accordingly, we see no basis for the contention * * * that the rights guaranteed to the members of the Association by the First Amendment have in any way been prejudiced."

(5) The Federal Constitution does not require an employer to bargain collectively with his employees.

Nor did the lower court depart from decisions of this Court in concluding that the Federal Constitution does not require an employer to bargain collectively with his employees.

It is the National Labor Relations Act which "makes it the employer's duty to bargain with his employees." *National Labor Relations Board v. Columbia Enameling & Stamping Co.*, 306 U. S. 292, 297; *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 683.

Again borrowing from the Board's brief on remand (p. 17),

> "Intervenor's contention that these rights are infringed rests on the premise that the First Amendment guarantees of free speech, press and assembly encompass the right of employees to be affirmatively protected in their organizational activity against employer interference and to select, and be represented by, an exclusive bargaining agent. In other words, Intervenor assumes that employees and labor organizations are entitled to the protection afforded by the National Labor Relations Act as a matter of constitutional right. An analysis of the rights of employees prior to the Act and of the nature of the rights created thereby conclusively demonstrates that Intervenor's fundamental assumption is erroneous."

In a note to the foregoing (p. 17), the Board points out that

> "The Association made the same contention before the Supreme Court, in connection with the Association's petition for certiorari in the *Young* case

> and the Board there answered it in the same manner as it is here doing. Memorandum for the N. L. R. B., pp. 10-11, *Foreman's Association of America v. L. A. Young Spring & Wire Corp. and N. L. R. B.*, No. 502, in the Supreme Court of the United States, October Term, 1947. As indicated, *supra*, note 3, the Supreme Court denied the Association's petition." (333 U. S. 837.)

The Board properly then continued in its brief (p. 18) by pointing out that prior to 1935, the right of employees to form labor organizations, etc., "was protected only against governmental infringement. It was well established that no provision of the Federal Constitution and federal law prevented employers generally from discharging employees for exercising these rights or from refusing to recognize or bargain with labor organizations. Thus when Congress, by enacting the National Labor Relations Act, imposed on employers the duty to refrain from interference and discrimination in matters of organization and to bargain collectively with duly designated bargaining representatives, it created rights against employers which did not theretofore exist." *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, D. C., D. C. "At the same time, however, Congress did not vest in employees or in labor organizations a right to compel employers to comply with these newly created obligations. It created 'public,' not 'private' rights and vested the power to vindicate them solely in the Board. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265; *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 362-363; *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 192-193."

From the foregoing, the Board concluded in its brief (p. 19) that:

"In the light of this background, it is obvious that neither employees nor labor organizations have 'a constitutional right to the advantage offered by the Act.' *National Maritime Union v. Herzog,*" 78 F. Supp. 146, D. C., D. C. "Indeed, since Congress, in enacting the National Labor Relations Act, chose to effectuate its policies by creating public rather than private rights, the withdrawal of the protection of the Act would not even infringe upon any pre-existing private or personal right of employees or labor organizations. Accordingly, Intervenor's assumption that the First Amendment guarantees encompass the benefits accorded by the Act is completely unjustified. Since its contention that the exclusion of supervisors under the amended Act contravenes the First Amendment rests solely upon this erroneous premise, it follows that such contention is also without merit."

(6) The Railway Labor Act cases relied on by the Association are not in point.

The lower court was right in refusing to give to the case of *Texas & N. O. R. Co. v. Brotherhood,* 281 U. S. 548, the effect urged by the Association in its brief (p. 10). The case is not in point. It involves the Railway Labor Act of 1926 (44 Stat. 577, 45 U. S. C. 151). That statute not only establishes certain rights of employees of carriers but *imposes certain duties upon carriers in respect to those rights.* It provides (Section 152) that *"It shall be the duty of all carriers * * * to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions,"* and that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." This Court held that although the Act contained no penalty for its violation by a carrier, rights and duties were created in the statute, and the conclu-

sion must be that enforcement was contemplated. "The right is created and the remedy exists" (pp 569, 570). In other words, there was a statutory right and the court enforced it.

The right to require employers generally to bargain collectively with supervisors, we repeat, has never existed aside from the 1935 National Labor Relations Act, and the portion of that Act so requiring is no longer in effect.

For the same reason as that which we have advanced in respect to the *Texas & N. O. R. Co.* case, the lower court did not conceive that *Virginian Ry. Co. v. System Federation No. 40,* 300 U. S. 515, was in point.

Parenthetically, "It is quite apparent that not every person in the service of a carrier, though subject to its continuing control and authority, is an 'employee'; but only those who perform work defined as that of an employee by existing or amended orders of the Interstate Commerce Commission," said the Court in *National Council v. Sealy,* 5th Cir., 152 F. 2d 500, basing its assertion upon the Railway Labor Act's definition of "employee" (45 U. S. C., Section 151).

Further, in respect to the *Texas* and the *Virginian Railway* cases, the petitioner says in its brief (pp. 11, 12):

> "• • • We do *not* urge that the protection afforded by the National Labor Relations Act is a constitutional right or that Congress may not withdraw the administrative and other remedies provided by that Act, or that the Act created vested rights of enforcement against employers, rather than public rights of enforcement, generally within the exclusive jurisdiction of the Board."

But, argues the petitioner, beginning at the foot of page 11 of its brief, the *Railway* cases hold that where there is

a right there must be a remedy, and to take away the right of supervisors to proceed under any applicable state statute is a denial of due process. Petitioner urges that the latter portion of Section 14 (a) of the 1947 Act deprives it of such right.

In answer, the lower court properly concluded, as we have heretofore stated, that nothing in the recently enacted federal statute deprives supervisors of their right to organize and their right to bargain collectively as those rights may be recognized in any statute.

Furthermore, as we have said, Section 14 (a) only spells out the 1935 Act as it was interpreted by this Court in *Bethlehem Steel Co. v. New York Labor Relations Board, supra,* 330 U. S. 767, that is, that Congress in enacting the 1935 Act usurped the field as to supervisors and that state boards, therefore, lacked jurisdiction to require employers under the federal statute to collectively bargain with their supervision.

It cannot be successfully claimed that Congress did not constitutionally set up a national policy when it provided in the 1935 Act that state statutes were not applicable to supervisors if their employers were covered by the Federal statute.

All that Congress did in the 1947 amendments, by the application of its power to regulate commerce, was to extend that national policy a step further by providing that such supervisors may not resort to the federal statute.

Of course "There is no constitutional right to have all general propositions of law once adopted remain unchanged." *Patterson v. Colorado,* 205 U. S. 454, 461.

Because of the foregoing, the first portion of petitioner's argument, which we have reviewed under head-

ing "A" hereof, does not bear out petitioner's claim that the lower court did not give proper effect to the decisions of this Court.

B. The claim of the Association that Sections 2 (3), 2 (11) and 14 (a) of the Amended Act deny due process of law under the Fifth Amendment because "those sections are based upon an arbitrary classification which bears no reasonable relation to the purposes of the legislation" is without merit.

Here, again, the lower court applied the law as announced in decisions of this Court.

(1) Exclusions of employers and employees in the 1935 and 1947 Acts.

The exclusion of supervisors from the coverage of the amended National Labor Relations Act is not the first instance of the exclusion of a classification of employees from that Act.

The Act as originally enacted provided that certain employers and certain employees were not subject to its terms.

What the 1947 amendments did was to continue those exclusions and to add to the exclusions certain other classes of employers and certain other classes of employees.

In the 1935 statute, the definition of "employer" (Section 2 (2)) expressly excluded (1) the United States, (2) the states and (3) political subdivision thereof, (4) persons subject to the Railway Labor Act, (5) labor organizations, other than when acting as employers, and (6) "anyone acting in the capacity of an officer or agent of such labor organization."

The 1947 Act (Section 2 (2)) added to the foregoing employer exclusions (1) wholly owned Government corporations, (2) Federal Reserve Banks, and (3) non-profit hospitals.

At to the term "employees," the definition of that term in the 1935 Act (Section 2 (3)) expressly excluded (1) individuals employed in agriculture, (2) persons in the domestic service of any family or person at his home, and (3) individuals employed by their parent or spouse.

The 1947 Act (Section 2 (3)) adds to these exclusions of "employees" (1) any individual having the statutes of an independent contractor, (2) supervisors, and (3) any individual employed "by any person who is not an employer as herein defined." In addition, it excludes individuals "employed in agriculture" as contrasted with "agricultural employees" as in the former Act.

Moreover, the 1935 Act treated professional employees and plant guards as it did other employees covered by the Act, while the 1947 amendments contain limitations as to both of these classes of employees. To be specific, Section 9 (b) of Section 101 of the 1947 Act provides "That the Board shall not (1) decide that any unit is appropriate for such purposes (collective bargaining) if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or * * * (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organiza-

tion admits to membership or is affiliated directly or indirectly with an organization which admits to membership employees other than guards." (The term "professional employee" is defined. Section 2 (12)).

All of which means that not only have certain employees and certain employers been omitted from the National Labor Relations Act since it was first enacted in 1935, but that the 1947 amendments removed the coverage of the Act from others than supervisors.

(2) Circuit Court of Appeals' conclusion that exclusion of supervisors is not arbitrary is in accord with the holdings of this Court.

In respect to the claim of the Association that the exclusion of supervisors in the 1947 Act is arbitrary, the Court of Appeals found against the Association. The Court, adopting the rulings of this Court, stated (p. 578) that it is "well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not invalid if it bears a reasonable relation to the purposes of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification, if it is not patently irrational and unjustifiable," citing *McCulloch v. Maryland,* 4 Wheat. 316, 422; *Carmichael v. Southern Coal & Coke Company,* 301 U. S. 495, 509, 513; *Charles C. Stewart Machine Co. v. Davis,* 301 U. S. 548, 584, 585; *Helvering v. Davis,* 301 U. S. 619, 646. The Court continued by stating (p. 578) that there are numerous instances of valid Federal legislation which classify and exempt certain types of employees from the provisions of the legislation enacted. It pointed out that the 1935 National Labor

Relations Act exempted some classifications of labor, and gave rights to employees which it withheld from employers; and that the Fair Labor Standards Act (29 U. S. C., Sections 201, 213), the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., 1947 Cum., Sections 901, 902), the Federal Insurance Contributions Act, (26 U. S. C., Sections 1400, 1426) and the Social Security Act (42 U. S. C., Sections 301, 409, 1107) as well exclude certain classifications of employees. The Court said (p. 578) that Congress gave careful consideration in enacting the 1947 Act to the proposal to exclude supervisory personnel, citing Report (No. 245) of the House Committee on Education and Labor on H. R. 3020; Report (No. 105) of the Senate Committee on Labor and Public Welfare on S. 1126; Cong. Rec. April 15, 1947, page 3533; April 23, 1947, page 3952; April 28, 1947, page 4260; May 1, 1947, page 4490; May 12, 1947, page 5146; June 6, 1947, page 6660, (hereinafter considered). The Court (p. 578) referred to the fact that Mr. Justice Douglas, in his dissenting opinion in *Packard Motor Car Co. v. National Labor Relations Board,* 330 U. S. 485, at page 496, said that "Trade union history shows that foremen were the arms and legs of management in executing labor policies. In industrial conflicts they were allied with management." The Court concluded (p. 578) that the action of Congress in treating supervisor's "as a part of management, was based upon substantial and real considerations, and was not an arbitrary or unjustifiable classification." It said (p. 578) that "The chief objection of the Foreman's Association to such a classification is that it deprives the supervisory employees of the protection given by the Act to other employees. But the Act also fails to give this protection to others who constitute a part of management. Whether it is desirable or undesirable, as a matter of policy, for foremen to organize and be classified as em-

ployees, is for Congress, not the Court to determine. *Packard Motor Car Company v. N. L. R. B., supra,* 330 U. S. at pages 490, 493."

(a) Congressional history.

The Congressional history referred to by the Court proves that Congress heard many witnesses and examined much documentary evidence, that it weighed the matter carefully, and that it did not act arbitrarily.

The report (No. 245) by the House Committee on Education and Labor on H. R. 3020 (the Labor Management Relations Bill, 1947) states in reference to "excluding foremen and other supervisory personnel from the definition of 'employee' ":

> "The evidence before the committee showed this to be one of the most important and most critical problems."

The report continues by saying that when Congress passed the original National Labor Relations Act the object was "to protect workers and their unions against foremen, not to unionize foremen." The history of the various positions taken by the Board as to foremen is covered. The following is then said:

> "The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but

> when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them. The evidence shows that rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be 'independent.' Without any question, this is why the unions seek to organize the foremen."

Experiences of employers as to supervision under the Act are narrated. The close tie-up of rank and file unions with the Foreman's Association of America is commented upon at length. "Supervisors are management people," the Report states. "Management, like labor, must have faithful agents."

The Committee concluded:

> "If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file nad into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.*"

The Report (No. 105) of the Senate Committee on Labor and Public Welfare on the bill (S. 1126) also shows that the Senate gave thorough consideration to the matter of excluding supervision from the coverage of the Act. The portion of the Report devoted to "supervisory personnel" begins:

> "A recent development which probably more than any other single factor has upset any real balance

> of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."

The report then reviews the difficulties certain employers had had because of the decision in the *Packard* case, *supra;* states that the definition of "supervisors" adopted by the Committee applies the test which the Board itself had set up in certain of its cases; and points out that any compromise under which supervisors would be protected by the Act if organized in strictly independent unions "would be completely unrealistic. There is nothing in the record developed before this committee to justify the conclusion that there is such a thing as a really independent foremen's organization"; and the Report refers to the testimony in that respect of the president of the Foreman's Association of America.

Congressional debates as well show that Congress carefully considered the matter of excluding supervisors from the coverage of the Act. For instance, the House Committee *"made the most exhaustive study and held the most exhaustive hearings"* (Cong. Rec., April 15, 1947, p. 3533). Senator Taft said (Cong. Rec., April 23, 1947, p. 3952) that the committee had "tried various in-between steps, but the general conclusion was that they (foremen) must either be a part of management or a part of the employees • • • we felt that on the questions of theory and of intention of the law, and on the considerations which I have submitted, foremen should be excluded from the operations of the National Labor Relations Act" (Cong. Rec., April 23, 1947, p. 3952). See as well Cong. Rec. April 15, 1947, p. 3556; Cong. Rec., April 28, 1947, p. 4260; Cong. Rec., May 1, 1947,

p. 4490; Cong. Rec., May 12, 1947, p. 5146; Cong. Rec., June 6, 1947, p. 6660.

The Report of the Joint Committee on Labor-Management Relations (Report No. 986, 80th Congress, 2d Session), which committee is provided for in Sections 401 through 407 of the Labor Management Relations Act, 1947, filed March 15, 1948, in discussing what has happened as the result of taking supervisors out from under the coverage of the National Labor Relations Act, concludes:

> "* * * Not only has the exclusion of supervisory employees from the benefits of the act failed to produce the work stoppages predicted by opponents of the provision, but it has served to promote the establishment by employers of plans creating many new benefits for supervisory employees."

The minority report of that same committee (Report No. 986, Part 2) does not take exception to the remark of the majority as to supervisors.

(b) Exemptions in other Federal statutes held valid.

The exemptions in the Fair Labor Standards Act, referred to above in the opinion of the lower court, were held not to violate the Fifth Amendment in *Mabee v. White Plains Publishing Company*, 327 U. S. 178, 184, where this Court said that "Congress may weigh relative needs and restrict the application of a legislative body to less than the entire field."

The same conclusion was reached by this Court in several cases involving the exemptions contained in the Social Security Act, which statute and its exemptions were also commented upon by the Court of Appeals, as above set forth. In *Carmichael v. Southern Coal & Coke Co., supra*, 301 U. S. 495, 509, this Court said that it is well

established that legislative classification "must be presumed to rest on (a rational) basis if there is any conceivable state of facts which would support it." In *Charles C. Steward Machine Co. v. Davis, supra,* 301 U. S. 548, 584, it was said that classifications and exemptions which have support in considerations of policy and practical convenience cannot be condemned as arbitrary. The latter case in so holding was cited with approval in *Helvering v. Davis, supra,* 301 U. S. 619, 646.

McCulloch v. Maryland, supra, 4 Wheat. 316, 422, is to the effect that courts will not inquire into the necessity for a classification if the classification is not "patently irrational and unjustifiable."

Mr. Justice Jackson, speaking for the majority of the Court in the *Packard* case, *supra,* 330 U. S. 485, 490, said that "it is for Congress, not for us, to create exceptions or qualifications at odds with (the Acts) plain terms."

(c) Exclusions and "intra-state employers."

The Foreman's Association, in its petition, page 21, dismisses the matter of the exclusion of certain employees from the National Labor Relations Act as enacted in 1935 by claiming that the exempted employees "were employed by intra-state employers." Counsel undoubtedly refers to the fact, as set forth on page 16 hereof, that the 1935 Act excludes from the definition of "employees" individuals employed in agriculture, persons in the domestic service of any family or person at his home, and individuals employed by their parent or spouse. But counsel has lost track of the fact that that Act as well excluded from the term "employer" the United States, the states and their political subdivisions, persons subject to the Railway Labor Act, labor organizations other than when acting as em-

ployers, and anyone acting in the capacity of an officer or agent of a labor organization (Section 2 (2)). The exclusion of the employer of course excludes the employees of such employer. As far as persons employed in agriculture are concerned, certain of them could have been placed under the Act on the basis of this Court's reasoning in *Wickard v. Filburn,* 317 U. S. 111, a case involving the exercise by Congress of its power under the commerce clause and involving the Agricultural Adjustment Act of 1938 (7 U. S. C., Sec. 1281).

Certainly the exclusions of the Longshoremen's and Harbor Workers' Compensation Act, heretofore referred to, cannot be brushed aside on the ground that those excluded are employees of "intra-state employers." That Act, enacted in 1927, provides (33 U. S. C., Section 902) that the term "employee" does not include "a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." The same is true of the Fair Labor Standards Act, referred to above, Section 213 thereof excluding all executive, administrative and professional employees, outside salesmen and many others not employees of "intra-state employers." The Social Security Act, also referred to above, as well excludes (Section 409) certain employees who are not employees of an "intra-state employer."

(d) Truax v. Corrigan not in point.

The lower court properly interpreted this Court's holding in *Truax v. Corrigan,* 257 U. S. 312, relied upon on page 23 of the Association's brief. All that case held was that a portion of a state statute was in violation of the equal protection clauses of the Fourteenth Amendment (p. 339), and that to give effect to a statute whereby serious losses, *inflicted by "unlawful means,"* are made remediless would

be to deprive the person suffering the loss of due process of law (p. 330).

(c) N. L. R. A. created public and not private rights.

The lower court applied the law of this Court in stating, pp. 577 and 579 of its opinion, that Congress, in enacting the National Labor Relations Act, created public and not private rights. *Amalgamated Utility Workers v. Consolidated Edison Company of New York,* 309 U. S. 261; *National Licorice Co. v. National Labor Relations Board,* 309 U. S. 350, 362, 363; *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, 192, 193. To borrow the language of the Court of Appeals (p. 579), there is no vested right in individuals to have the rules of law remain unchanged for their benefit. *Middleton v. Texas Power & Light Co.,* 249 U. S. 152, 163; *New York Central R. Co. v. White,* 243 U. S. 188, 198. A proceeding by the Board is in the public interest, and is remedial and preventative, rather than punitive in nature. *National Labor Relations Board v. Thompson Products, Inc.,* 6 Cir., 130 F. 2d 363, 367.

In conclusion on this phase of the Association's argument, we state, as did the Board in its brief on remand (p. 21), that "We submit that it can hardly be contended that Congress was 'patently irrational and unjustified' in concluding that the 'real balance of power in the collective-bargaining process' might be upset if labor organizations were permitted to continue invoking the Act 'for covering supervisory personnel, traditionally regarded as part of management.' S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 304."

C. Paragraphs 1 (a) and (b) of the Board's Order

The lower court, having found the sections in question of the 1947 Act constitutional, applied the ruling of this Court in holding that the two paragraphs of the Board's cease and desist order (R. 55) should not be enforced due to the fact that they operate *in futuro*.

The Association contended before this Court, in connection with the Association's petition for certiorari in the *Young* case, that even though supervisors were no longer within the scope of the National Labor Relations Act, nevertheless a cease and desist order of the Board, entered prior to the 1947 amendments becoming effective, should be enforced (No. 502, October Term, 1947). The Court of Appeals, District of Columbia, had held to the contrary. *L. A. Young Spring & Wire Corp. v. National Labor Relations Board,* 163 F. 2d 905. This Court denied certiorari. 333 U. S. 837.

For the foregoing reasons, the Company submits that the lower court held, in accord with decisions of this Court, that the sections of the 1947 Act in question are not based on an arbitrary classification.

II.

THE DECISION BELOW DOES NOT INVOLVES A QUESTION OF GENERAL IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The rule of this Court is that the issuance of writs of certiorari are sparingly exercised. *Forsyth v. Hammond,* 166 U. S. 506, 514; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.,* 240 U. S. 251, 258.

Such being true, and considering the fact that the court below followed the decisions of this Court, the fact that

the claims of the petitioner have no merit as appears from the opinion of the court below and from this brief, and the fact that the National Labor Relations Board contested petitioner's claims below, it would seem that no question of general importance, which has not been settled by this Court, is involved and that the petition should be denied.

III.

CONCLUSION

Because of all the foregoing, the Company urges that the petition be denied.

Respectfully submitted,

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